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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WAYNE WILLIE SMITH, Defendant and Appellant.	A123429 (San Francisco City & County Super. Ct. No. 203594)

Appellant was arrested with drugs in his possession on two occasions. On one of those occasions, he also participated in the sale of crack cocaine to an undercover officer. He was convicted of possession for sale and sale of cocaine, and possession of heroin.

Appellant now argues that the trial court erred in admitting evidence of his pretrial statements to a police officer, and of his sale of cocaine on a previous occasion. As to the first contention, we find that the admission of the evidence, even if it was error, was harmless beyond a reasonable doubt. As to the second contention, we find no abuse of discretion by the trial court. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

A. The July Incident

On July 20, 2007, San Francisco Police Officer Peter Richardson, accompanied by two other officers, went to a single room occupancy (SRO) hotel on 16th Street near Mission Street, which is a high drug traffic area, to conduct a parole search of appellant. The manager directed them to appellant's room, and they knocked on the door.

When appellant answered the door, Richardson showed his police badge and identified himself as a police officer. In response, appellant tried to force the door closed, but Richardson, with the help of one of the other officers with him, was able to prevent appellant from doing so. After about 30 seconds, appellant stopped trying to close the door, and the officers entered the room. Appellant ran towards the room's open window, but one of the officers grabbed him and stopped him before he got there.

As the officers entered the room, Richardson saw appellant drop a plastic bag onto the floor, which Richardson picked up because he suspected it contained rock cocaine. Another officer seized two plastic bindles of suspected heroin and a scale from on top of the bed. The suspected drugs were later tested, and found to consist of 6.94 grams of cocaine base and .91 grams of heroin. Appellant was arrested, and a search disclosed that his front pants pocket contained over $500 in bills of varying denominations, ranging from $20 bills to $1 bills. The officers did not find any packaging or cutting materials in the room, and they also found no paraphernalia associated with the use of cocaine or heroin.

A police expert witness opined that appellant possessed the cocaine for sale, based on the facts surrounding this incident, including appellant's presence in an SRO hotel; his attempt to keep the officers out and then his effort to run to the window; the quantity of cocaine; the amount of cash in small denominations; and the presence in the room of a scale, but no smoking paraphernalia and no clothing or personal hygiene items. The expert also testified that it would be unusual for a person weighing 300 pounds to be a user of crack cocaine.[1]

B. The November Incident

At about 2:50 p.m. on November 9, 2007, San Francisco Police Officer Leonard Poggio was working in plain clothes as a member of a team of officers conducting a

[1] At the time of his arrests in the two incidents involved in this case, appellant weighed about 240 to 300 pounds.

controlled drug purchasing operation in the neighborhood of 16th and Mission Streets in San Francisco, where there is a lot of drug traffic. Poggio approached appellant and asked him if he had "solid," which is street slang for crack cocaine. Appellant said that he did, and directed Poggio to walk with him to a nearby donut shop.

Inside the donut shop, Poggio encountered appellant's codefendant, Christina Holmes, who immediately approached appellant and Poggio. Appellant then handed Holmes an unwrapped off-white rock, which looked to Poggio like cocaine base, and told Holmes to "sell him this 20." Poggio did not see where appellant got the rock from. Holmes then told Poggio to follow her outside to a nearby doorway, where she handed Poggio the same rock and asked him for $20. Poggio examined the rock, confirmed that it appeared to be crack cocaine, and handed Holmes a marked $20 bill.

Poggio then gave a prearranged signal to another officer on his team, and as Holmes returned to the donut shop, Poggio walked across the street. Within a minute, from across the street, Poggio saw Holmes leave the donut shop a second time, cross the street, and sit down on the sidewalk. Poggio watched Holmes continuously from the time she left the donut shop the second time until she was arrested about 15 minutes later. He did not see her try to dispose of or conceal anything during this time. Nonetheless, when she was searched after her arrest, the police found no drugs, paraphernalia, or money in her possession, and the marked $20 bill Poggio had given her was never found. It was not uncommon for this to occur.

After Poggio gave the signal, another officer, Robert Greiner, arrested appellant inside the donut shop. At the police station, Greiner searched appellant, and recovered five off-white rocks wrapped in plastic from the area of appellant's buttocks. The search did not disclose any paraphernalia associated with the use of crack cocaine. The loose rock sold to Poggio and the wrapped ones recovered from appellant's buttocks area were tested, and proved to be cocaine base weighing a total of about three grams.

The donut shop had video surveillance cameras installed, but the police did not make any effort to obtain the footage of the events leading up to appellant's arrest, although they did request and receive surveillance video tapes from the owner of the same donut shop on one other occasion. As of November 2007, the shop owners may not have had the ability to provide recordings from their surveillance cameras, and if they did, the police may not yet have been aware of this.[2]

A police expert witness testified that appellant possessed the cocaine for sale, based on the facts surrounding this incident, including the neighborhood; the initial sale itself; the presence of additional individually wrapped cocaine rocks in appellant's buttocks area; the absence of smoking paraphernalia; and the use of a donut shop as the location for part of the transaction.

C. Charges and Pretrial Proceedings

On December 31, 2007, the San Francisco District Attorney filed an information charging appellant (and Holmes, on count three only) as follows: (1) count one: possession for sale of cocaine base on July 20, 2007 (Health & Saf. Code, § 11351.5); (2) count two: possession of heroin on July 20, 2007 (Health & Saf. Code, § 11350, subd. (a)); (3) count three: jointly with Holmes, transportation, sale, and giving away of cocaine on November 9, 2007 (Health & Saf. Code, § 11352, subd. (a)), with allegations that both defendants sold and offered to sell cocaine base (Pen. Code, § 1203.073, subd. (b)(7)) and committed the offenses listed in count three within 1,000 feet of a school where minors were present (Health & Saf. Code, § 11353.6, subd. (b)), and as to appellant only, that he committed the offense while released from custody, on a felony offense, on bail or on his own recognizance (Pen. Code, § 12022.1); (4) count four:

[2] The owner of the donut shop testified on July 21, 2008, that the camera system in the shop had been changed 10 months earlier, from two cameras that did not record, to four cameras that did record. The shop owner also testified, however, that she had memory problems, and was not sure of the date on which the system changed, though she thought it was probably after the new year.

possession for sale of cocaine base on November 9, 2007 (Health & Saf. Code, § 11351.5), with the additional allegation, as to appellant, of the same bail enhancement as alleged in count three, under Penal Code section 12022.1. The information, as subsequently amended, also alleged that appellant had two prior felony convictions, one on June 3, 2004, and one on December 8, 2005, each of which was alleged under four separate statutes: Health and Safety Code section 11370, subdivisions (a) and (c); Health and Safety Code section 11370.2, subdivisions (a) and (c); Penal Code section 1203.07, subdivision (a)(11); and Penal Code section 667.5, subdivision (b).[3]

Prior to trial, the prosecution moved to introduce evidence that appellant had several prior narcotics convictions. Appellant filed a motion seeking to exclude such evidence under Evidence Code section 352. The trial court ruled that the evidence would be excluded as confusing, but warned that if appellant put on evidence in his defense case to the effect that he had no knowledge that the substances were drugs, or that they were possessed for personal use, the court would permit the prosecution to use the prior crimes evidence to rebut this evidence. As discussed *post*, after appellant presented his defense case, the trial court permitted the prosecution to present evidence that appellant sold drugs in May 2005.

D. Appellant's Statements to Officer Tursi

At a hearing outside the jury's presence under Evidence Code section 402, San Francisco Police Inspector John Tursi testified as follows. On July 23, 2007, while appellant was in custody following his arrest for the July incident, Tursi spoke with appellant in an interview room at the county jail. Tursi was wearing plain clothes, and did not give appellant any *Miranda* warnings before speaking with him. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Tursi explained to appellant that he was investigating the

[3] The information also alleged a third prior conviction, but this was stricken on the prosecution's motion on July 31, 2008. Additional allegations were also made as to Holmes, but they are not relevant to this appeal.

money seized from appellant at the time of his arrest. Appellant said it was his SSI money. Tursi then asked appellant if he wanted to make a formal recorded statement about the case, and appellant declined, but then said that he did not have any drugs in his possession. Tursi then said, " 'Let's go over the report,' " and appellant did not object, so Tursi read the narrative portion of the police report to appellant. Appellant then admitted that the heroin found in the hotel room was his, though he denied ownership of the cocaine. Appellant testified that at the time, he thought Tursi was his lawyer, and that Tursi "made [appellant] think he was on my side," though he did not remember what Tursi did or said that gave him that impression.

After the Evidence Code section 402 hearing, the trial court permitted Tursi to testify in front of the jury about his encounter with appellant. Tursi testified that when he first made contact with appellant, he introduced himself as a police officer, and showed him his "star," or police badge. Tursi told the jury that appellant declined to make a formal statement; said that he did not have the drugs in his possession, and then, after they "ended up going over the police report," stated that he had some heroin on him when he was arrested on July 20, 2007, but did not have any cocaine.

E. Appellant's Expert Witness

One of appellant's defenses at trial was that he was a drug user, not a drug dealer.[4] To bolster this argument, appellant presented the testimony of Gerald Miller as an expert on cocaine and heroin use. Miller testified that the area around 16th and Mission Streets in San Francisco is a low-income, high drug traffic area, and that rooms in the SRO hotels in that area are often rented for a short time. Miller acknowledged on cross-examination that drugs are bought and sold in SRO hotels, and that the presence of a

[4] Appellant also sought to persuade the jury that there was insufficient evidence to support the prosecution's case as to the November incident, based on his attempt to show that the officers could have produced videotapes of what occurred in the donut shop, but failed to do so. He has not renewed that contention on appeal.

scale or cash, and the absence of paraphernalia, are relevant factors in determining whether someone possesses a drug for personal use or for sale. Miller opined that addicts may conceal their drugs in their buttocks area when moving from one location to another.

Miller testified that most crack cocaine users use a pipe to smoke it, and that crack cocaine smokers will often keep taking the drug continuously for long periods of time unless they are arrested or become too sick to continue using it. Thus, it is possible for a person to use as much as an ounce of crack in a single day. He also explained that cocaine builds up a tolerance, and that crack users will sometimes use heroin to come down from the crack so that they can feel the cocaine high when they start smoking crack again. Miller also opined that not all crack users are thin, and that fat crack users do exist. He acknowledged, however, that as a generalization, crack users are usually thin.

F. Rebuttal Evidence of Appellant's June 2005 Drug Sale

In rebuttal of Miller's testimony, the judge permitted the prosecution to put on a portion of the prior crimes evidence that had previously been excluded, instructing the jury beforehand that the evidence was to be considered only for intent, knowledge, or motive, but not to show propensity. A police officer then testified that on June 15, 2005, he watched appellant walk out the front door of an SRO hotel near Leavenworth and Ellis Streets in San Francisco. There was a group of eight or nine people outside the hotel, who appeared to be waiting for something, and they "literally charged towards" appellant when he emerged. As the members of the group gathered around him, appellant appeared to take something out of his mouth with his fingers, extend his hand to a person in the group who had his or her hand outstretched, and then accept money from that person. This pattern was repeated with at least five different people.

After counting the money and putting it in his pocket, appellant reached around to his buttocks area and removed an object that looked like a plastic bag, unfolded and untwisted it, took out a small number of white objects, and put them in his mouth. He then closed the bag and returned it to his buttocks area. Appellant was arrested, and a

strip search revealed that the plastic bag contained a number of white rocks that proved to consist of 9.26 grams of rock cocaine, including the plastic wrapping.[5] Appellant was not found to have any drug consumption paraphernalia on this occasion.

Appellant put Miller on the stand again in order to rebut this testimony. This time, Miller testified as an expert on possession with intent to sell and sale of cocaine base. He testified that knowing a person had seven grams of crack cocaine and one gram of heroin in an SRO hotel would not in and of itself permit him to determine whether the possession was for sale rather than for personal use. He gave the same opinion with respect to the amount of money a person is carrying in cash. Buyers as well as sellers may be in possession of a scale, because buyers may want to use it to make sure they are not being cheated. People may be selling drugs at one time, and just using them at another time. The absence of a weapon and packaging materials, however, is an indication that the person is not a seller. Finally, Miller opined that storing drugs in one's buttocks area is more consistent with possession for personal use than with possession for sale, because a seller is likely to keep the drugs in a location where they can be accessed more quickly, such as one's mouth, waistband, or pocket.

G. Conviction and Sentencing

On July 24, 2008, the jury found appellant guilty on all four counts, and found all of the additional allegations in the indictment that were submitted for its decision to be true.[6] The allegations regarding appellant's prior convictions were bifurcated and set for a nonjury trial, and appellant subsequently admitted them, except as to the one which was

[5] The technician who testified at appellant's trial reported the gross weight of the drugs as 9.26 grams. Two other technicians who testified the drugs seized from appellant that day apparently got different results; one reported a weight of 9.53 grams, and the other reported a weight of 10.9 grams.

[6] The jury deadlocked as to Holmes. She later pleaded guilty to a single count of sale of a controlled substance, and then appealed. This court affirmed her conviction. (*People v. Holmes* (Sept. 9, 2009, A123982) [nonpub. opn].)

stricken. On October 2, 2008, appellant was sentenced to a total state prison term of 13 years, 4 months. This timely appeal ensued.

DISCUSSION

A. Admission of Appellant's Statements to Police

The trial court admitted appellant's statements to Tursi into evidence on the authority of *People v. Haley* (2004) 34 Cal.4th 283, reasoning that although appellant was in custody at the time (a fact respondent does not contest), Tursi's actions in reading the police report to appellant were not the functional equivalent of an interrogation, and therefore did not trigger the need for *Miranda* warnings. Appellant now argues that the trial court erred in this regard. We need not and do not reach the issue whether Tursi should have given appellant *Miranda* warnings, because our examination of the record convinces us that even if appellant's statements to Tursi were obtained in violation of *Miranda*, the admission of those statements was harmless beyond a reasonable doubt.

The police officers' testimony regarding appellant's possession of illegal drugs during the July incident was plausible and uncontroverted. The only defense evidence related to the July incident was Miller's expert testimony on the question whether appellant was a drug user rather than a drug seller. Appellant's admission to Tursi that he had heroin in his possession during the July incident did not materially affect that defense, as appellant was not charged with selling heroin or possessing it for sale, but only with simple possession. Appellant's false exculpatory statement to Tursi that he did not have any cocaine also did not damage his defense case. Appellant did not testify, and his credibility therefore was not in issue. To the extent that the false exculpatory statement reflected consciousness of guilt, it added little, if anything, to the officers' testimony regarding appellant's effort to keep them from entering his hotel room, followed by his flight toward the open window.

In short, given the weight of the evidence against appellant, and his failure to proffer any defense evidence negating his possession of the drugs involved in the July

incident, we are persuaded that the admission of Tursi's testimony, even if error, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 36.)

B. Admission of Evidence of June 2005 Cocaine Sales

As already noted, appellant's defense case rested primarily on the testimony of Miller, the drug abuse expert, who testified, among other things, that crack users smoke up to an ounce of crack a day, and sometimes use heroin to come down from crack. After this testimony was introduced, and over the objection of appellant's trial counsel, the trial court permitted the previously excluded evidence of appellant's crack cocaine sales in June 2005 (discussed *ante*) to be introduced in order to rebut the implication of the expert's testimony that the drugs found in appellant's possession were for his personal use rather than for sale.

Appellant now contends that this prior crimes evidence should have been excluded under Evidence Code section 352 because it was inflammatory and unduly prejudicial, in that the uncharged crimes from 2005 were much more egregious than the charged crimes. As appellant acknowledges, our standard of review on this issue is abuse of discretion. (See *People v. Lenart* (2004) 32 Cal.4th 1107, 1123; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.) An exercise of trial court discretion "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Appellant characterizes the evidence regarding his June 2005 crimes as portraying him as a "major drug dealer" and "kingpin" who was "preying on the desperation of street crack addicts." He also notes that on the occasion of the prior crime, he was found with a larger quantity of cocaine—nine or ten grams—than in this case, when he had slightly less than seven grams (plus just under a gram of heroin) in the July 2007 incident, and a total of three grams in the November 2007 incident.

The amounts of crack cocaine found in appellant's possession in July and November 2007, however, were not different by orders of magnitude from the amount he possessed in June 2005. Moreover, the pattern of behavior was very similar—in both June 2005 and November 2007, appellant sold cocaine on the street, in a neighborhood known for having a great many drug users and street dealers, and in both June 2005 and July 2007, he possessed drugs in the vicinity of an SRO hotel.

Most significantly, the evidence of appellant's cocaine sales in June 2005, just like the facts of the July and November 2007 incidents, marked appellant as a low-level street dealer, not a "kingpin." (See, e.g., *People v. Superior Court (Clements)* (1988) 200 Cal.App.3d 491, 500 [characterizing drug "kingpin" as someone who enjoys " 'certain knowledge that he may have at his beck and call lawyers whose fees run into hundreds of thousands of dollars' " and who has sufficient " 'undeserved economic power . . . to command high-priced legal talent' "].) Accordingly, we are not persuaded that the trial court abused its discretion in determining that the probative value of this evidence, in establishing that appellant possessed cocaine with the intent to sell, outweighed its prejudicial impact.

DISPOSITION

The judgment is affirmed.

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RUVOLO, P. J.

We concur:

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SEPULVEDA, J.

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RIVERA, J.